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IN THE

Supreme Court of the United States

October Term, 1966

No. 1098

PROHIBITION PARTY OF MICHIGAN, et al.,
Appellants,
vs.
JAMES M. HARE, SECRETARY OF STATE FOR MICHIGAN, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT FOR THE STATE OF MICHIGAN

JURISDICTIONAL STATEMENT

ELSMAN, YOUNG & ROGALLE,
By: JAMES L. ELSMAN,
2034 Guardian Building,
Detroit, Michigan 48226,
Attorneys for Appellants.

FRANK J. KELLEY,
Attorney General for the State of Michigan,
ROBERT A. DERENGOSKI,
Solicitor General,
RUSSELL A. SEARL,
Assistant Attorney General,
Attorneys for Appellees.

Interstate Brief & Record Co., 356 E. Congress St., Detroit, Michigan 48226
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ON APPEAL FROM THE SUPREME COURT FOR THE STATE OF MICHIGAN

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of the State of Michigan entered on October 21, 1966, granting leave to appeal to said Supreme Court prior to decision by the Michigan Court of Appeals, but therein also dismissing this case on the merits. This Statement is submitted to show that the Supreme Court of the United States has jurisdiction of this appeal, and further, that substantial questions under the U. S. Constitution of the right of franchise and the rights of third parties in our political system are presented to interest this Court in a thorough consideration of this subject at this time in history.

OPINION BELOW

Other than the summary order of October 21, 1966 from the Michigan Supreme Court, attached hereto as Appendix A, no opinion was issued by the Michigan Supreme Court. Other than the summary order of October 19, 1966 from the Michigan Court of Appeals, an inferior tribunal to the Michigan Supreme Court, a copy of which is attached hereto as Appendix B, no opinion was issued by said Court of Appeals. For purposes of record clarification, it appears the Michigan Supreme Court assumed jurisdiction without knowing the Court of Appeals had made a decision a few days previously, but this fact is of no consequence to Appellants' position.

JURISDICTION

This suit was brought as an original action in the Michigan Court of Appeals seeking a ruling that Michigan Statute Annotated 6.1685 (providing petition signature requirements for political parties and their candidates to be printed on official State election ballots) was unconstitutional under the State and the U. S. Constitution, 14th Amendment. Judgment dismissing the cause was entered on October 19, 1966. Thereafter, the Michigan Supreme Court reviewed the case, purportedly prior to a decision by the Court of Appeals, and by judgment dismissed the cause on October 21, 1966. Notice of Appeal to the U. S. Supreme Court was filed in the Michigan Supreme Court on January 4, 1967.

The jurisdiction of the U. S. Supreme Court to review the decision of the Michigan Supreme Court by direct appeal is conferred by Title 28, United States Code, Section

1257 (2). The following decision and others cited later sustain the jurisdiction of the U. S. Supreme Court to review the judgment on direct appeal. Most recently, this Court has considered a similar state statute on appeal in *MacDougall v. Green*, 335 U. S. 281 (1948).

QUESTION PRESENTED

Where a state statute requires, as a condition for the Prohibition Party to be officially printed on general election ballots, that such a party, if previously printed on the ballot, attain a vote of 1% of the votes cast for Secretary of State at the preceding election, or, if not previously printed on the ballot, obtain by circulation of petitions in a prescribed manner, written signatures equal to at least 1% of the votes cast for Secretary of State at the last election, do these and other technical requirements of the statute in question violate the Fourteenth Amendment of the U. S. Constitution "privilege and immunity", "equal protection" or "due process" clauses as being unreasonably burdensome in effect on members of the Prohibition Party of Michigan, preventing their Party from being printed on the official ballot, after a history of being on such ballot from 1876-1960, and further preventing individual Party candidates from being printed on such ballot to be given a fair opportunity to compete for the votes of the American public against other candidates of other parties whose names were officially printed to be so viewed by voters on election day?

STATUTES INVOLVED

Michigan Statutes Annotated 6.1685 being Michigan Public Acts 1961, No. 223 as set forth in Appendix C hereto. Michigan Statutes Annotated 6.1737 (4) being Michigan Compiled Laws of 1948, Sect. 168.737.

STATEMENT

A. Raising of Constitutional Questions.

The attack on Fourteenth Amendment grounds upon MSA 6.1685 was first raised in the Plaintiff's original Complaint for Mandamus, Superintending Control and Injunctive relief, filed originally in the State Court of Appeals and then considered as an original matter by the Michigan Supreme Court. This U. S. constitutional question was further raised and argued in Plaintiff's Short Brief to Support Application for Leave to Appeal to the Michigan Supreme Court Prior to Decision by the Court of Appeals, paragraphs I (A), III, IV, V (2), and in such Application (paragraph 2), both a part of the certified record in this case. No oral argument or further briefs were presented or requested. As related above, there were no opinions written in either the Court of Appeals or the Michigan Supreme Court, and thus, the constitutional questions were disposed of summarily in the judgments of dismissal attached respectively as Appendix A and B hereto.

B. Facts.

1. Introduction

Plaintiff Prohibition Party of Michigan is an unincorporated association of individuals banded together for the purposes of making effective in the political market-place the platform of the national Prohibition Party (sometimes named Christian Prohibition Party), which 26 Plank Comprehensive Platform is set forth as Attachment #B to the Complaint in this action. The executive headquarters of the national Party is in Michigan and its Executive Director, Dr. D. D. Gibbons, is a Plaintiff in this suit. Unfortunately perhaps for its contemporary public image, the name "Prohibition Party" is somewhat misleading, having historical derivations, in that it communicates today a narrowness of political concern, whereas in fact 25 of the 26 Platform Planks deal with political concerns other than alcohol and cover all the concerns of the major two political parties.

2. History

Since this cause, at bedrock, involves the right to continued political life of a minority third party and its adherents, which Party has long existed and has long made contributions to the American political market place, it may be helpful to refer to history. The Prohibition Party dates formally from at least 1869. As examples of contributions, it claims to have declared publicly for the following programs before either of the two current major parties: universal suffrage (1872); direct election of U. S. Senators (1872); the income tax (1896); child labor laws (1908); employers liability acts (1908); old age pensions (1916); unemployment insurance (1916).

3. Michigan History

Further, the Prohibition Party has qualified to be on every Michigan presidential election year ballot from 1872 up to and including 1960. Effective September 8, 1961, the predecessor statute to the current MSA 6.1685 at bar was changed by the two majority parties which totally constituted the Michigan Legislature to require a notarized affidavit on party nominating petitions and further to require separate petition sheets for separate cities and townships. Because of such unreasonably burdensome new requirements, due allegedly to anti-third party legislative sentiment, the Prohibition Party failed to qualify for printing on the 1962 general election ballot, having obtained only 9,800 signatures out of the statutory requirement of 17,538, based on a formula of 1% of the votes cast for the successful Secretary of State at the preceding election. Again, in 1964, the Prohibition Party failed to obtain the required number of 14,896 signatures, falling just short with a total of 12,000 signatures. In the 1966 election, the Prohibition Party obtained about 12,000 signatures before giving up hope of obtaining the required number of 19,336, based again on the same 1% formula.

Individual Plaintiffs are members of the Prohibition Party of Michigan, desire to vote for such Party on a printed ballot, and further desire to run for office as nominated by their Party, respectively as U. S. Senator (E. H. Munn) and Secretary of State (Dr. D. D. Gibbons), and to be printed on the ballot for equal access to the voters.

Having failed to comply with the requirements of MSA 6.1685, so to secure party printing on the official 1966 Michigan election ballot, Plaintiff Prohibition Party of Michigan, nevertheless, in regular course, went ahead and held its fall convention as did other major political parties and forwarded to the Director of Elections, who works for

Defendant Secretary of State, a list of the Party's nominees for major offices, including U. S. Senator, Governor, Lt. Governor, Secretary of State, etc., plus a copy of the Party vignette and requested certification and printing on the official ballot of the Party vignette and said slate of candidates. By letter of August 30, 1966, attached to the Complaint as Attachment A, the Director of Elections refused to certify the Party or its candidate nominees on the basis of statutory non-compliance (MSA 6.1685), which non-compliance Appellants admit to.

4. Nature of Litigation

On September 16, 1966, Plaintiffs filed their Complaint as an original action in the Michigan Court of Appeals and pursuant to Michigan court rules, filed concurrently an Application for Leave to Appeal to the Michigan Supreme Court Prior to Decision by Court of Appeals, along with Plaintiffs' Short Brief to Support Application for Leave to Appeal to the Michigan Supreme Court Prior to Decision by the Court of Appeals. Such Brief claimed that MSA 6.1685 was unreasonably burdensome as applied to minority third parties and namely the Prohibition Party, in violation of the "privileges and immunities", the "due process" and the "equal protection" clauses of the Fourteenth Amendment to the U. S. Constitution.

Such violations specifically were alleged to be the unreasonably large number of signatures required (if signatures should be required at all for ballot access in a free society), since the number arbitrarily depended each election year on how many votes the winning candidate for Secretary of State got at the last election, which figure did historically rise or fall substantially with the popularity of such candidate; since minority parties lacking statewide

county organizations are not well-equipped to manage the tedious, perfunctory, but expensive work of petition signatures; since the signatures must be gathered and filed 6 months prior to the election, thus burdening all parties in facing a low level of interest in the populous; and finally, since the *Model Election Law* of the American Civil Liberties Union recommends that the appropriate formula require only 1/10 of one percent of the vote cast in the preceding gubernatorial election with a maximum requirement of 10,000 signatures, which requirement the Prohibition Party could have met in 1966 and previous years. Defendants' position throughout the litigation was of course that MSA 6.1685 was reasonable State regulation of the franchise.

Besides the unreasonably burdensome number requirements and associated minority party handicaps, the Brief attacked MSA 6.1685 for setting unreasonably burdensome forms to such petitions e.g. that petitions must be signed by at least 100 persons from 10 separate counties in the state (as if one signature was not equal to another), and that no more than 35% of the signatures be from one county, and that signers declare their "intent to organize" the Party, etc. and not merely the interest to help a competitive Party to get on the ballot.

C. Disposition by State Courts.

After filing the original Complaint in the Court of Appeals, which Complaint asked for an order directing Defendants to print the Prohibition Party and its candidates on the official ballot, Plaintiffs moved in the Court of Appeals for Immediate Consideration on September 27, 1966, and thereafter on September 28, 1966 in response to Defendants' Answer, filed in the Michigan Supreme Court a Reply to Answer to Plaintiffs' Application for Leave to Appeal to the Michigan Supreme Court Prior to

Decision by the Court of Appeals. Defendants filed an Answer and Brief in opposition to Plaintiffs' Application for Leave to Appeal in the Supreme Court, and an Answer in the Court of Appeals. All such documents are a part of the record in this case. On October 19, 1966 the Court of Appeals dismissed the Complaint without opinion and on October 21, 1966 the Michigan Supreme Court granted leave to appeal and concurrently dismissed the Complaint on its own motion and without opinion. On January 4, 1967 Plaintiffs filed Notice of Appeal to the Supreme Court of the United States.

THE QUESTIONS ARE SUBSTANTIAL

This Court's *Reynolds v. Sims*, 377 U. S. 533, and other "one-man, one-vote" decisions were cited below and are mentioned here, along with *MacDougall v. Green*, 335 U. S. 281 (1948), to buttress the claim of this Court's jurisdiction, as well as to introduce the important constitutional question of franchise rights at stake. The *MacDougall* case involved attack on a state statute similar to the one at bar, where the Court was forced by the pressures of time to make a fast decision in sustaining the statute, over vigorous dissent by Justices Douglas, Black and Murphy, and with one other judge concurring with the majority only because he felt time was too short for the Court to properly exercise equity jurisdiction. In candor, it is counsel's humble opinion that the key practical question facing the Court in this Jurisdictional Statement is whether this Court wants to re-examine, without the rush of time pressure, *MacDougall*, in view of the Court's recent strong concern in other areas of the franchise, and in view of the overriding fact in this case that what was once a major political party in our country and which still offers a comprehensive program on political issues is disappearing be-

cause of State ballot laws passed by the major parties, and in view of the overriding question of whether the Prohibition Party and other third parties should be allowed more free access to the printed official ballot under the Constitution than allowed by MSA 6.1685 (and similar statutes in other states).

Even the Socialist Labor Party, which narrowly qualified for a place on the 1966 Michigan printed ballot, as the only other party besides the two major parties, has requested and is preparing to file an *amicus* brief in this case, protesting the financial and personnel burden it must bear as a minor third party in complying each election year with the Statute, a burden which dilutes the time all third parties can give to the essential contribution of third parties in our free society—contributing and publicizing competing ideas and programs for the public to consider and vote for or against. As was said by Richard Hofstadter in *The Age of Reform* pp. 98-99:

> "But third party leaders in the United States must look for success in terms different from those that apply to the major parties, for in those terms third parties always fail . . . Their function has not been to win or govern, but to agitate, educate, generate new ideas, and supply the dynamic element in our political life . . ."

MacDougall has been judicially ignored and used in dissenting opinions of this Court since 1948, but it has not been overruled specifically or by implication in a case with similar facts. The majority in *Baker v. Carr*, 368 U. S. 251 at p. 254 minimizes *MacDougall* by saying, "*MacDougall v. Green*, 335 U. S. 281 held only that in that case equity would not act to void a State's requirement . . ." In the same case, *MacDougall* is used in dissenting and concurring opinions, as it was later in *Gray v. Sanders*, 372 U. S. 383, and again in *Lucas v. Colorado General Assembly*, 377 U. S. 713.

As a point in passing, one would think that if this Court were to show the concern in the minority party area of our politics as it has in the legislature apportionment area, and were to sanction a formula similar to that recommended by the American Civil Liberties Union, there would be less judicial-administrative problems flowing therefrom than have come from the legislative apportionment decisions.

This Court has long carefully protected the right which is so basic to our system of government, the right of franchise, from state laws which arbitrarily and unreasonably discriminate against citizens in the exercise of the right to vote. *Nixon v. Herndon*, 273 U. S. 536; *Smith v. Allright*, 321 U. S. 649; and, more recently, *Baker v. Carr*, 369 U. S. 251 and other "one-man, one-vote" decisions.

Some of the discrimination involved in this whole issue of ballot access for minority parties concerns the perhaps subtle discrimination of making financial fund raising an element of political success. This element cannot be minimized or relegated to a mere "political" matter since it affects constitutional rights in a very direct sense and the legislative branches, dominated as they are by the major parties, are not likely to make this financial factor less a burden to minority parties, even if they are capable of some reform at all. Indeed, as future briefing in this case will reveal more extensively, the aura of elections being "bought" has very much been present in Michigan and elsewhere. As one of the Defendants in this case, JAMES M. HARE, said in the August 9, 1966 *Detroit News* in the context of a U. S. Senate election where one man spent $190,000 of his own money and total *primary* expenses for the two candidates in one party were over $700,000:

> "No real expense limit therefore exists (because of the legal statutory avoidance of forming separate

committees). Thus, with the escalating cost of campaigning, the real danger exists that public offices will be open only to the independently wealthy or to those indebted to interest groups who furnished the campaign money."

For reasons cited above and others, MSA 6.1685 discriminates in its practical operation against Plaintiff Prohibition Party since it requires unreasonably burdensome achievements not reasonably related to any state concern except the intolerable concern to avoid the administrative work and some additional printing expense of having third parties. Such signature procurement is not only unreasonably burdensome to a minority third party in the volume it requires and the form it demands, but there is great expense involved as well, and it is common knowledge in the State that the two major parties pay workers to perform such perfunctory tasks for individual candidates, a financial burden the Prohibition Party cannot afford nor justify otherwise. Also, the requirements of 100 signatures from 10 counties and no more than 35% of the signatures from one county cannot be justified under the "one-man, one-vote" rule of law recognized by this Court, considering too that the Prohibition Party does not have an organization in all counties of the State, but tends to organize through area camp-meetings.

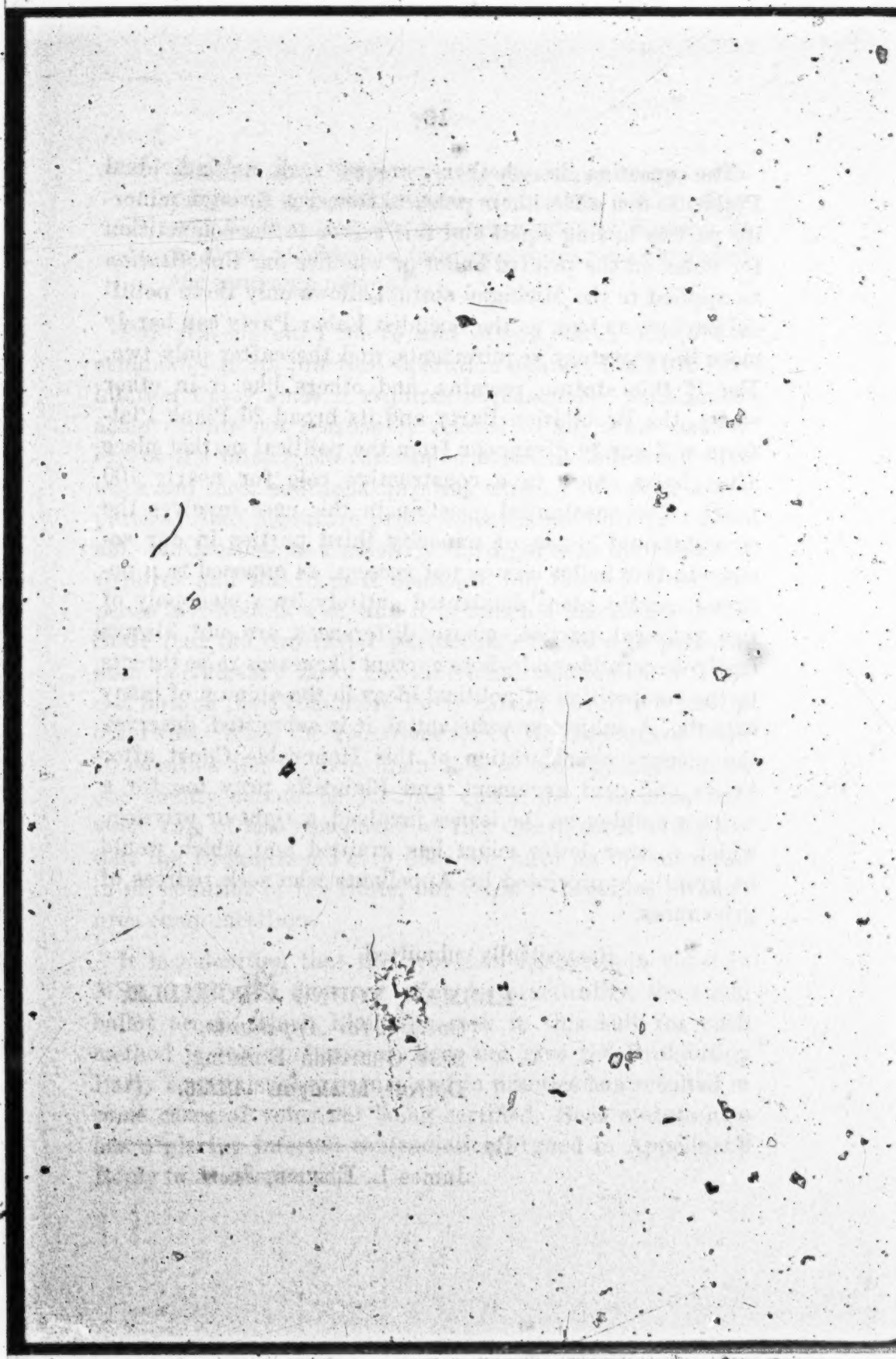
It is submitted that the provision for write-in votes in MSA 6.1737 (4) does not offer, in practicality, the equal ballot access which Plaintiffs seek in this suit for such method is too cumbersome, does not give the Prohibition Party equal visual exposure and in practice has resulted in some cases of votes not being certified. Such statute also has a glaring internal contradiction argued in Appellant's Reply to Answer.

The question is whether persons such as individual Plaintiffs can effect their political concerns through minority parties having equal and fair access to the competition for votes on the printed ballot or whether our *Constitution* as applied to the Michigan statute allows only three political parties, as long as the Socialist Labor Party can barely meet the statutory requirements, and thereafter only two. For if this statute remains, and others like it in other states, the Prohibition Party and its broad 26 Plank Platform will surely disappear from the political market place after being there in a constructive role for nearly 100 years. The substantial question in this case involves the constitutional rights of minority third parties in our society to fair ballot *access*, not success, as opposed to a political market place dominated entirely by a monopoly of two political parties, whose differences are not always easily discernible and whose current likenesses raise threats to the competition of political ideas in the opinion of many experts. A subject so substantial, it is submitted, deserves the plenary consideration of this Honorable Court after briefs and oral argument, and Plaintiffs pray too for a written opinion on the issues involved, a right or privilege which neither lower court has granted and which would be greatly appreciated by Appellants who seek redress of grievances.

Respectfully submitted,

ELSMAN, YOUNG & ROGALLE,
Counsel for Appellants,
2034 Guardian Building,
Detroit, Michigan 48226.

By _____
James L. Elsman, Jr.



APPENDIX "A"

At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 21st day of October in the year of our Lord one thousand nine hundred and sixty-six.

Present the Honorable Thomas M. Kavanagh, Chief Justice, John R. Dethmers, Harry F. Kelly, Eugene F. Black, Theodore Souris, Otis M. Smith, Michael D. O'Hara, Paul L. Adams, Associate Justices.

On order of the Court, the application for leave to appeal prior to decision by the Court of Appeals is considered, and the same is Granted. The said cause is thereupon dismissed by this Court, on its own motion, under GCR 1963, 852.2(8), for the reason that a meriterious basis is not shown.

State of Michigan—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Mihcigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 21st day of October in the year of our Lord one thousand nine hundred and sixty-six.

/s/ Donald F. Winters
Clerk.

(Seal)

APPENDIX "B"

At a Session of the Court of Appeals of the State of Michigan, Held at the Court of Appeals in the City of Lansing, on the 19th day of October in the year of our Lord one thousand nine hundred and sixty-six.

Present the Honorable Louis D. McGregor, Presiding Judge, Thomas Giles Kavanagh, Timothy C. Quinn Judges.

In this cause a complaint for mandamus, superintending control, and injunctive order, motion for order to show cause, and brief in support of application for leave to appeal to the Michigan Supreme Court prior to decision by this Court is filed by plaintiffs, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

It is Ordered that said complaint for mandamus, superintending control, injunctive order, and order to show cause shall be and the same is hereby Denied.

State of Michigan—ss.

I, Ronald Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 24th day of October in the year of our Lord one thousand nine hundred and sixty-six.

/s/ Ronald L. Dzierbicki,
Clerk.

(Seal)

APPENDIX "C"—Statutes

MSA 6.1685, P.A. 1961, No. 223, reads as follows:

"Qualifying of new party for place on ballot; petition, signatures, form; disqualification and requalification of parties. Sec. 685. The name of no candidate of a new political party shall be printed upon the official ballots of any election unless the chairman and secretary of the state central commitee of the party shall have filed with the secretary of state, at least 6 months prior to such election, a certificate signed by them bearing the name of the party, and unless accompanying the certificate there shall have been filed petitions bearing the signatures of registered and qualified electors equal to not less than 1% nor more than 4% of the number of votes the successful candidate for secretary of state received at the last election in which a secretary of state was elected. The petitions shall be signed by at least 100 residents in each of at least 10 counties of the state and not more than 35% of the minimum required number of the signatures may be by resident electors of any one county. All signatures appearing upon the petitions shall have been obtained within a period of 6 months immediately preceding the date of filing. The validity and authenticity of the signatures may be determined in the same manner as provided for initiatory and referendary petitions in section 9 of article 2 of the state constitution. The petitions shall be in substantially the following form:

PETITION TO FORM NEW POLITICAL PARTY

We, the undersigned, duly registered electors of the city, township (strike one) of ....., county of ....., state of Michigan, residing at the places set opposite our names, hereby declare our intention to organize the ..... party, and respectfully request the secretary of state, in accordance with section 685, Act No. 116, Public Acts of 1954, as amended, to receive the certificate and vignette of our party, tendered herewith, for filing, and place the names of our candidates on the ballot at the ..... election.

Warning: Whoever knowingly signs petitions to organize more than one new state political party, signs a petition to organize a new state political party more than once or signs a name other than his own, is violating the provisions of the Michigan election law.

.....

.....

.....

The size of all organizing petitions shall be 8½ inches by 13 inches and shall be printed in the following type sizes: The words "petition to form a new political party" and the name of the proposed political party shall be in 24-point bold face type; the word "warning" and the language contained therein shall be in 12-point bold face type.

No political party, the principal candidate of which shall have received a vote equal to less than 1% of the total number of votes cast for the successful candidate for the office of secretary of state at the last preceding election in which a secretary of state was elected shall have the name of any candidate printed on the

ballots at the next ensuing election, nor shall a column be provided on the ballots for such party. Any party so disqualified may again qualify and have the names of its candidates printed in a separate party column on each election ballot in the manner set forth in the first paragraph of this section for the qualification of new parties. The term "principal candidate" of any party shall be construed to mean the candidate whose name, shall appear nearest the top of the party column."

• • • • •

MSA 6.1737 (4), being Michigan Compiled Laws of 1948, Sect. 168.737, provides:

"If the elector wishes to vote for a candidate not on any ticket, he may write or place the name of such candidate on his ticket opposite the name of the office and make a cross (X) in the circle under the party name."

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MAR 29 1967
JOHN F. DAVIS, CLERK

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On Appeal From The Supreme Court For The State Of Michigan

MOTION TO DISMISS OR AFFIRM

FRANK J. KELLEY
ATTORNEY GENERAL

Robert A. Derengoski
Solicitor General

Russell A. Searl,
Assistant Attorney General

Attorneys for Appellees

The Capitol
Lansing, Michigan

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1966

PROHIBITION PARTY OF MICHIGAN, et al., Appellants, vs. JAMES M. HARE, SECRETARY OF STATE FOR MICHIGAN, et al., Appellees.	No. _____

MOTION TO DISMISS OR AFFIRM

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the above entitled cause be dismissed or affirmed on grounds that no substantial federal question is presented.

Statement

Appellants challenge the constitutionality of Section 685 of Act 116, PA 1954, the Michigan Election Law, as last amended by Act 312, PA 1965, CL 1948 §168.685 MSA 1965 Cum Supp §6.1685. Said section requires that for a new party to be entitled to have its party ticket and the names of candidates nominated by it printed upon the general election ballot, there must be presented to the Secretary of State a petition bearing the signatures of registered and

qualified electors of the state equal to not less than 1% nor more than 4% of the votes received by the successful candidate for the office of Secretary of State at the last general November election. Petitions are required to be signed by at least 100 residents in each of at least 10 counties and not more than 35% of the minimum required number may be by resident electors of any one county.

Such requirement is not applicable to any party whose ticket was printed upon the ballot at the preceding general election, unless the total vote cast for the principal candidate of that party at such election was less than one per cent of the number of votes cast for the successful candidate for the office of Secretary of State at such election, or at the last election at which a Secretary of State was elected.

Not having complied with the requirements of that section, Appellants sought an order of the Michigan Supreme Court requiring the printing of its party ticket on the ballot for the ensuing general election on the theory that the statutory requirements are so unreasonable as to be constitutionally defective.

The Michigan Court of Appeals, on October 19, 1966, dismissed the complaint without opinion. The Michigan Supreme Court granted leave to appeal and concurrently dismissed the complaint on October 21, 1966 "for the reason that a meritorious basis is not shown."

Argument

The provisions of Section 685 are specifically authorized by Section 4 of Article II of the Michigan Constitution of 1963, and were also authorized by Section 8 of Article III of the Michigan Constitution of 1908. The provisions

of said section reasonably regulate the time, place and manner of all nominations and elections in order to preserve the purity of elections and to guard against abuses of the elective franchise.

Appellants recognize in their brief that restrictions upon the right of political parties to have their party ticket printed upon the election ballot may be validly imposed but question the reasonableness of the restrictions prescribed by Section 685. Obviously reasonable restrictions are permissive, otherwise a "bed sheet" ballot would undoubtedly be required upon which to print any ticket which would otherwise be certified by numerous parties regardless of whether there was sufficient support for them within the state to justify their inclusion on the ballot.

Appellants characterize the "model election law" of the American Civil Liberties Union which prescribes a maximum limitation of 10,000 signatures as a "reasonable statute" and suggest that had the legislature enacted that statute appellants' party would have been able to qualify.

We suggest that whether the required percentage should be 1/10 of 1% of the total vote cast for all candidates for Governor, or 1% of the vote cast for the successful candidate for Secretary of State, and whether a maximum limitation of 10,000 or some other number of votes should be prescribed, are questions of policy vested by the State Constitution in the Michigan legislature.

Appellants criticize the legislative selection of votes cast for the office of Michigan Secretary of State, instead of some other office upon which the required number of signatures shall be determined. However, one familiar with the policy and rationale of the Michigan Election Law will recognize that the legislature selected an office, the candi-

date for which will normally receive a fairly constant percentage of the vote. In selecting that office the legislature avoided the office of Governor which is designated in the model election law in order to avoid the fluctuation in the total votes received by a particularly popular candidate, such, for example, as G. Mennen Williams or George Romney. We suggest that the designation of the office of Secretary of State rather than the office of Governor supports the reasonableness of the requirements of Section 685.

Appellants also complain of the requirements of the statute that signers on individual petitions be limited to electors of a given city or township. Such requirement is not confined to petitions of a party seeking to have its ticket printed upon the ballot. Similar requirements as to a candidate's nominating petitions have been in effect for many years. CL 1929 §2871. Such requirement was continued and is presently part of Section 544c of the Michigan Election Law, MSA 1965 Cum Supp §6.1544(3).

Prior to 1941 signers of petitions for amendment to the Constitution, as well as initiative and referendum petitions, were only required to be "qualified" electors. The abuse upon occasion of the constitutional right for circulating and filing such petitions was evidenced by the decision of the Michigan Supreme Court in *Michigan State Dental Society v. Secretary of State,* (1940) 294 Mich 503; 293 NW 865. Shortly following the issuance of that opinion, the Michigan legislature at its 1941 regular session proposed amendments to Section 1 of Article V and Section 2 of Article XVII of the 1908 Constitution. Such amendments were ratified by the people at the biennial spring election of 1941 and implemented by Act 246, PA 1941, CL 1948 §200.1, et seq; MSA §6.6851 et seq. Such constitutional requirements were

continued in the 1963 Constitution and implementing statutes. [1]

As a practical matter, the requirement that signers be registered as well as qualified electors and that the signers of a given petition be limited to residents of a particular city or township permits where necessary for determining the validity of the signatures upon such petitions. The desirability of provisions making possible a determination as to the validity of signatures upon petitions is demonstrated by the decision of the Michigan Supreme Court in *Keyes v. Secretary of State,* (1960) 360 Mich 610; 104 NW 2d 781.

Section 685 further specifies that not more than 35% of the minimum required signatures will be by residents of any one county and that at least 100 signatures be those of residents of each of at least 10 counties.

Appellants sought to have their ticket printed upon the ballot for a state-wide—not a local—election. Obviously the purpose of such statutory requirement is to evidence the existence of at least a reasonable state-wide—as distinguished from purely local—support for the particular party. We suggest that such nominal requirement is obviously reasonable.

Appellants further complain of the resulting necessity for a fairly substantial organization and the practical necessity of at least minimal financing. Such requirement is

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[1]

Petitions for constitutional amendments: Section 2 of Article XII of the Constitution, MSA 1965 Cum Supp §6.1471, et seq.

Initiative and referendum petitions: Section 9 of Article II of the Constitution.

not peculiar to a particular party seeking to engage in a state campaign but rather is a fact of life for election to any state office. Appellants' argument in this respect can hardly be said to be based upon constitutional grounds of invidious discrimination or lack of reasonable grounds for classification. As the court held in *Tomlinson v. Tomlinson*, (1953) 338 Mich 274; 61 NW 2d 102:

> "On the narrower phase of the question we merely observe that the guaranty of equal protection of the law is not one of equality of operation or application to all citizens of the State or nation, but rather one of equality of operation or applicability within the particular class affected. * * *." p. 278.

As a preface to considering the authorities cited by appellants, it is pointed out that no qualified elector is prevented from voting and no candidate is prevented from receiving votes for any office by virtue of the requirements of Section 685. The Michigan statutes have for several decades made provisions for the voting for a candidate whose name does not appear on any ticket printed on the ballot by means of write-in or sticker. There is printed upon each of the partisan election paper ballots for use at each general November election instructions as required by Section 706 of Act 116, PA 1954, the Michigan Election Law, as last amended by Act 56, PA 2d Ex Sess of 1963, MSA 1965 Cum Supp §6.1706. Included in such instructions is:

> "If you wish to vote for a candidate not on any ticket, write or place the name of such candidate on your ticket opposite the name of the office."

Such instruction is based upon the following statutory pro-

vision, Section 737(4) of Act 116, as amended, CLS 1961 §168.737(4), MSA 1956 Rev Vol §6.1737(4):

> "If the elector wishes to vote for a candidate not on any ticket, he may write or place the name of such candidate on his ticket opposite the name of the office and make a cross (X) in the circle under the party name; • • •."

Provisions comparable to Section 737(4) were included in CL 1929 §3111 and CL 1948 §178.19(4), and comparable provision in slightly different wording is contained in Section 11(4), Chapter 10 of Act 203, PA 1917, and the predecessor statute CL 1915 §3697; Section 26 of Act 214, PA 1901, and in CL 1897, §3636; Section 26 of Act 59, PA 1897, and Section 26 of Act 202, PA 1893. See also Section 26 of Act 190, PA 1891.

As evidenced by the above-cited statutes, the right to vote for a candidate whose name is not printed upon the ballot by write-in or sticker has been guaranteed by the Michigan statute for some 75 years. We suggest that such right is a matter of common knowledge among the general public, as well as among local election officials, including members of boards of election inspectors for the several precincts.

For the benefit of any elector whose recollection as to the proper method of voting by write-in or sticker needs to be refreshed, directions with respect thereto are, as required by the above-quoted statute, printed near the top of each ballot.

Thus, the issue presented here is not the right of any elector to vote for candidates nominated or endorsed by the Prohibition Party. Rather, the issue is the right of a party to have its party ticket and the names of its nominees

printed upon the official general election ballot.

Appellants concede the existence of a decision of the United States Supreme Court in which the court rejected the contentions here urged. *MacDougall v. Green*, 335 US 281; 93 Led 3 (1948). That case involved the validity of a similar Illinois statute, the distinction being the more exacting requirements imposed by that statute. It specified that the petition for a new political party must contain 25,000 valid signatures, including at least 200 from at least 50 of the state's 102 counties. The majority opinion held that the statute was not so discriminatory in its application as to amount to a violation of due process, equal protection, or the privileges and immunities clauses of the 14th Amendment or other provisions of the United States Constitution.

Mr. Justice Rutledge concurred because of the impracticality of granting injunctive relief so close to the ensuing election. Counsel stresses the dissenting opinion by Mr. Justice Douglas with whom Justices Black and Murphy concurred. We suggest that the following quotations from that opinion disclose that each of the dissenters might well have concurred in the majority opinion had the validity of the Michigan statute rather than the Illinois statute been presented.

Justice Douglas stated in *MacDougall* at 335 US 289; 93 Led 10:

> "• • • There is no attempt here, as I have said, to make the required signatures even approximately proportionate to the distribution of voters among the various counties of the state. No such proportionate allocation could of course be mathematically exact. Nor would it be required. But when, as here, the law applies a rigid, arbitrary formula to sparsely settled counties

and populous counties alike, it offers no basis whatever to justify giving greater weight to the individual votes of one group of citizens than to those of another group. * * *."

Appellant cites later cases in which this court has cited *MacDougall*. His argument is to the effect that this court would no longer recognize that decision. However, this court has never overruled *MacDougall*. Furthermore, the cases cited by counsel in which reference to that decision is made did not involve the issue there and here presented, i.e. validity of requirements of a statute providing for petitions for a new political party.

Baker v. Carr, 369 US 186; 7 L.ed 2d 663 (1962), only held that a complaint based upon the failure of the Tennessee legislature to reapportion the legislative seats of that state was a justiciable couse of action of which the Federal Court would take jurisdiction.

Gray v. Sanders, 372 US 368; 9 L.ed 2d 821 (1962), involved the validity of the Georgia county unit system; *Lucas v. Colorado General Assembly*, 377 US 713; 12 L.ed 2d 632 (1964); *Scholle v. Secretary of State*, 367 Mich 176 (1962); *Reynolds v. Sims*, 377 US 533; 12 L.ed 506 (1964), were each legislative apportionment cases. The excerpts from certain of the opinions in those cases in which reference is made to the court's decision in *MacDougall* should be read in the light of the issue there presented. We, therefore, urge:

1. *MacDougall v. Green* is controlling authority against appellants' contentions and not having been overruled by the United States Supreme Court should be followed as present law.

2. The requirements of the Illinois statute, the validity of which was involved in MacDougall, were such as to render that statute much more vulnerable to the criticism made thereof in the dissenting opinion of Justice Douglas than would the Michigan statute herein involved. We suggest that the probabilities are that had the same court passed upon the validity of the Michigan statutes instead of the Illinois statutes, the three dissenting justices might well have upheld the requirements of our statute as being entirely reasonable.

Appellants cite, in addition to the apportionment cases, *Nixon v. Herndon*, 273 US 536, 71 L. ed 759 (1926) as examples of the protection afforded by this Court against arbitrary and unreasonable discrimination against the exercise of the right of franchise. In *Nixon* this Court struck down a Texas statute which purported to disqualify Negroes from participating in Democratic Party primary elections.

We reiterate that, in the case at bar, electors are in no way restricted from voting for any candidate of their choice. Should they see fit they may vote for a candidate for any office who is either nominated or supported by the Prohibition Party.

With respect thereto, this further word of explanation should be furnished. The affidavit of Bernard J. Apol, Assistant Director of Elections of the State of Michigan, is attached to the answer of appellees as filed in this case in the Court of Appeals. Attached to that affidavit as Exhibits A and B are copies of one page of each of two election manuals for use by Boards of Election Inspectors as published in 1961. Those contain instructions for voting by write-in or sticker for candidates whose names are not printed on the ballot. However, it is also stated that no

sticker vote will be counted for President or Vice President. This resulted from a previous ruling based upon the fact that while the names of the candidates for President and Vice President are printed on the ballot in the presidential years in Michigan, as a matter of fact the electors do not vote directly for them but instead for candidates for the office of presidential electors. As a result of a subsequent action in the Michigan Supreme Court, *Munn et al v. Secretary of State et al,* Calendar 51041 (1964), the officers of the Prohibition Party filed with the Secretary of State a certified copy of the names of its nominees for the office of President and Vice President and the list of presidential electors chosen by that Party. Votes cast for those candidates by write-in or sticker at the 1964 general election year were in fact counted.

The Appellees suggest that none of the cited decisions is authority for holding the Michigan statutory provision to be so unreasonable as to be subject to constitutional infirmities.[2] In Appellees' view it is moreover apparent that the rationale of the Michigan Supreme Court in *Cady v. City of Detroit,* (1939) 289 Mich 499; 286 NW 805, is particularly applicable to the instant case. The Michigan Court in its opinion in *Cady* stated, at page 508, as follows:

> "A statutory determination will not be set aside as denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it. *Metropolitan Casualty Ins. Co. v. Brownell,* 294 U.S. 580 (55 Sup. Ct. 538); *Naudzius v. Lahr,* 253 Mich. 216

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[2]

States having similar statutory provisions are: Conn. G.S.A. §9-72; Maine Rev. Stats. A., Title 21 §445; Gen. Stats. N.C. §163-1; Ohio Rev. Code A. §3517.00; Wis. Stat. A. §5.19; Burn Ind. Stat. §29-3801; Vernons Texas Civil Stat. Art. 13.50 and Ill. Stat. Ann., Chap. 46 §10-2.

(74 A.L.R. 1189, 30 N.C.C.A. 179). It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such a contrariety. *Borden's Farm Products Co., Inc. v. Baldwin*, 293 U.S. 194 (55 Sup. Ct. 187). * * *."

Conclusion

The enactment of Section 685 is specifically authorized by Article II, Section 4 of the present Michigan Constitution, and was previously authorized by Article III, Section 8 of the Michigan Constitution of 1908. Said provision in no way limits the right of Michigan electors to vote for candidates nominated or endorsed by the Prohibition party.

Section 685 of the Michigan Election Law clearly constitutes reasonable state regulation of the time, place and manner of nominations and elections and said provision is intended and does in fact guard against abuse of the elective franchise, thus helping to preserve the purity of the Michigan election process.

Appellees respectfully submit that this appeal does not, therefore, raise any serious or substantial question under the equal protection and due process clauses of the Fourteenth Amendment.

Wherefore, Appellees pray that the above entitled cause of action be dismissed or affirmed.

FRANK J. KELLEY
ATTORNEY GENERAL

Robert A. Derengoski
Solicitor General

Russell A. Searl,
Assistant Attorney General

Attorneys for Appellees

The Capitol
Lansing, Michigan

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

PROHIBITION PARTY OF MICHIGAN ET AL. *v.* HARE ET AL.

APPEAL FROM THE SUPREME COURT OF MICHIGAN.

No. 1098. Decided April 24, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

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